Supreme Court, U. S.
FILED
APR 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONSOLIDATED MOTOR INNS, *Petitioner,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Consolidated Motor Inns, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (hereinafter "the Court of Appeals") entered in the above case on January 6, 1978 denying Petitioner's Motion to Vacate the Order of the United States District Court for the Northern District of Georgia (hereinafter "the District Court") entered on February 20, 1976, after the Court of Appeals had dismissed Petitioner's appeal for mootness on September 1, 1977.

OPINIONS BELOW

The opinion of the Bankruptcy Court in the Northern District of Georgia, Atlanta Division (hereinafter "the Bankruptcy Court") entered on October 15, 1975,

is not reported, either officially or unofficially, but a true copy thereof is attached hereto as part of the Appendix of this Petition (Pet. App. 1a-8a). The opinion of the District Court entered on February 20, 1976, is not reported either officially or unofficially, but a true copy thereof is attached hereto as part of Petitioner's Appendix (Pet. App. 9a-15a). The opinion of the Court of Appeals entered on September 1, 1977, is not reported officially or unofficially, but a true copy thereof is attached hereto as part of the Petitioner's Appendix (Pet. App. 16a). The opinion of the Court of Appeals entered on January 6, 1978, is not reported officially or unofficially, but a true copy thereof is attached hereto as part of the Petitioner's Appendix (Pet. App. 18a).

JURISDICTION

The judgment of Court of Appeals (Pet. App. 18a) was entered on January 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in denying Petitioner's Motion to Vacate the Order of the District Court entered on February 20, 1976, which Order Petitioner had appealed from to the Court of Appeals, when the Court of Appeals had previously granted the Motion of Alias Enterprises, Inc., the Respondent herein, to be substituted as Appellee, and had additionally granted the Motion of the Respondent/Appellee to Dismiss the appeal filed by Petitioner for mootness after Petitioner had indicated in its response to the Motion to Dismiss for Mootness filed by Respondent that it would not object to the dismissal of the appeal on the grounds of mootness if, and only if, simultaneously with said dismissal the Court of Appeals directed the District Court to vacate its Order dated February 20, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions directly involved in this controversy. Rather, as explained in more detail below in the Statement of the Case and the Reasons For Granting the Writ, this matter involves a failure of the Court of Appeals to follow accepted procedures applicable when a case is dismissed for mootness, which have been firmly established by prior decisions of this Court as well as the Court of Appeals and other Federal Courts.

STATEMENT OF THE CASE

On January 6, 1978, the Court of Appeals entered its Order denying the Motion of Petitioner to Vacate the Order of the District Court entered on February 20, 1976 (Pet. App. 18a), which had been appealed from by Petitioner. This Motion was necessitated by the previous action of the Court of Appeals in granting the Motion of Alias Enterprises, Inc., the Respondent, to be substituted as Appellee in the case then pending before the Court of Appeals, and in further granting the Motion of the substituted Appellee/Respondent to dismiss the appeal taken by Petitioner from the aforementioned Order of the District Court on the grounds that said appeal was moot. (Pet. App. 16a).

Briefly, the factual background surrounding this matter is as follows:

On October 15, 1975, the Bankruptcy Court entered an Order confirming a Plan of Arrangement which had

been proposed by your Petitioner in accordance with the provisions of Chapter XII of the Bankruptcy Act (11 U.S.C. §§ 801 through 926), and the Rules of Bankruptcy Procedure for Chapter XII (Pet. App. 1a-8a). The jurisdiction of the Bankruptcy Court to enter such Order was founded on the provisions of § 472 of the Bankruptcy Act (11 U.S.C. § 872).

After the entry of this Order by the Bankruptcy Court, Brand Development Corporation (hereinafter "Brand"), the original Appellee in this matter, and BVA Credit Corporation (hereinafter "BVA"), another creditor of the Debtor/Petitioner, filed Notices of Appeal of the Bankruptcy Court's Order to the District Court. Prior to the filing of the notice of appeal by Brand, the Bankruptcy Court had entered an Order disallowing the claim of Brand for voting purposes based upon the pendency of an Objection to Claim filed by Debtor/Petitioner against Brand, together with a Counterclaim filed in connection therewith by Debtor/Petitioner against Brand.

Before the appeal proceeded, BVA withdrew its Notice of Appeal.

Debtor/Petitioner had approximately 400 creditors, and no other creditors filed an appeal from the Order of the Bankruptcy Court. In fact, no other creditors of Debtor/Petitioner, other than BVA, refused payment of the consideration tendered under the provisions of the Plan of Arrangement which had been confirmed by the Bankruptcy Court.

The appeal of Brand resulted in the entry of the Opinion on February 20, 1976, by the District Court which provided, in pertinent part, that the portions of the Debtor's Plan of Arrangement and Order of the

Bankruptcy Court confirming same which sought to discharge the individual partners of the Debtor and their wives from the liabilities of the partnership were invalid and of no effect because of § 5(j) of the Bankruptcy Act. 11 U.S.C. § 23(j).

The Debtor/Petitioner appealed from the Order of the District Court to the Court of Appeals, which appeal was resisted by Brand, as Appellee.

While the appeal by Brand from the Order of the Bankruptcy Court was pending, and continuing during the time the appeal of Petitioner from the Order of the District Court was pending, BVA sought to pursue collection efforts against the partners of Petitioner and their wives based upon purported guarantees by said persons of debts owing by Petitioner to BVA.

While Petitioner's appeal to the Court of Appeals was pending, Brand transferred its claim against Petitioner to Alias Enterprises, Inc., Respondent herein, a wholly-owned subsidiary of a substantial creditor of Brand, and unrelated to Petitioner, its partners or their wives. (Pet. App. 19a-20a).

Then on July 14, 1977, the Bankruptcy Court entered an Order approving a settlement between Alias and Petitioner, which settlement provided that the claims of Brand and Alias against Petitioner would be withdrawn without any payment from Petitioner and the Counterclaim which Petitioner had filed against Brand would likewise be withdrawn without payment to Petitioner. (Pet. App. 21a-22a).

Thereafter, pursuant to Rules 43 and 27 of the Federal Rules of Appellate Procedure, Alias Petitioned the Court of Appeals to be substituted as Appellee for

Brand and further requested that the appeal filed by Petitioner from the Order of the District Court described above be dismissed for mootness. (Pet. App. 23a-24a).

Petitioner responded to the Motion of Alias indicating that it would not object to the substitution of Alias as the Appellee in the case, and further indicating that it would not object to the dismissal of its appeal on the grounds of mootness, *if, and only if, simultaneously with said dismissal the Court of Appeals directed the District Court to vacate its Order dated February 20, 1976.* (Pet. App. 25a).

In its brief in support of its response to the Motion of Alias, Petitioner cited to the Court of Appeals the provision of the Order of the District Court holding that the discharges of the general partners and their spouses and the injunction entered pursuant thereto were invalid and of no effect. Furthermore, Petitioner argued specifically in said brief that it would not be proper for the Court of Appeals to simply dismiss the appeal unless it also required the District Court to vacate its Order, since the possibility would remain that other creditors, who did not appeal the confirmation of the Plan proposed by Petitioner, might take advantage of the Order of the District Court holding invalid a part of the Order of Confirmation, and without the Petitioner having had its day in Court on the correctness of the District Court Order, the appeal filed by Petitioner might not be moot as to other creditors who did not appeal the Order confirming Petitioner's Plan of Arrangement. (Pet. App. 26a-28a).

Thereafter, the Court of Appeals entered an Order, granting the Motion of Alias to be substituted as a party, and further granting the Motion of Alias to dismiss the appeal filed by Petitioner. (Pet. App. 16a) The Court of Appeals did not, however, as a part of said Order, direct that the District Court vacate its Order entered on February 20, 1976.

After receiving notice of the entry of this Order, counsel for Petitioner inquired of the Office of the Clerk of the Court of Appeals what the proper procedure would be for requesting that the Court of Appeals vacate the Order of the District Court entered on February 20, 1976, and was advised that the proper procedure would be by the filing of a Motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure requesting such action.

Petitioner filed such a Motion pointing out to the Court of Appeals that Petitioner had previously requested that the Court of Appeals not dismiss the appeal of Petitioner for mootness unless, as part of said dismissal, it vacate the Order of the District Court entered on February 20, 1976. (Pet. App. 29a-36a).

In its brief in support of said Motion, Petitioner cited to the Court of Appeals the case of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950) in which this Court acknowledged its established practice of reversing or vacating the judgment below and remanding the case with a direction to dismiss when an appeal from a court in the Federal system had become moot. Petitioner also cited to the Court of Appeals its decision in the case of *Lebus* v. *Seafarers' International Union, etc.*, 398 F.2d 281 (C.A. 5, 1968) in which the Court of Appeals in dismissing an appeal as moot, and ordering the decision of the District Court vacated over the objection of the Appellee, stated that it is the time honored invariable

practice in the Federal system where an appeal is dismissed by reason of mootness for the Appellate Court to vacate the decision below and direct that it be dismissed for mootness so that it will spawn no legal consequences or establish untested precedent. (Pet. App. 37a-40a).

The Court of Appeals denied the Motion of Petitioner on January 6, 1978. (Pet. App. 18a).

Subsequent to the original decision of the Court of Appeals granting the Motion of Respondent, Alias, to dismiss the appeal of Petitioner on the grounds of mootness, BVA has continued to press its claim against the partners of the Petitioner and their wives, by dismissing its action in the Court in which it had been stayed, and reinstituting same in the District Court, in which Court the action is now pending.

Subsequent to the latest decision of the Court of Appeals entered on January 6, 1978, the Bankruptcy Court, on February 14, 1978, entered an Order in accordance with the remand of the District Court contained in the opinion entered on February 20, 1976, vacating those provisions contained in the original Order of confirmation entered on October 15, 1975, which had been declared invalid by the District Court's opinion (Pet. App. 41a-44a). Petitioner has filed a Notice of Appeal to said Order of the Bankruptcy Court (Pet. App. 45a).

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals in denying Petitioner's Motion to Vacate the Order of the District Court should be reviewed by this Court, because such action by the Court of Appeals constitutes an extreme

departure from the proper procedure to be followed in a case such as this, where an appeal has been dismissed for mootness. This procedure has been acknowledged on many occasions by this Court as well as the Court of Appeals. Furthermore, the action of the Court of Appeals in refusing to vacate the judgment of the District Court upon the dismissal of Petitioner's appeal for mootness has placed this Petitioner, as well as all other persons who may be similarly situated in the future, in the position of being faced with potentially adverse legal consequences spawned by an Order of a United States District Court which has become unreviewable, although appealed from in a proper manner.

In the case of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 95 L.Ed. 36, 71 S.Ct. 104, this Court said:

> "The established practice of the Court in dealing with a civil case from a court in the Federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Company* v. *Greenwood County,* 299 U.S. 259, 267, 81 L.Ed. 178, 182, 57 S.Ct. 202, to be 'the duty of the Appellate Court.'
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> . . .
>
> . . . Our supervisory power over the judgments of the lower Federal Courts is a broad one [cites omitted] . . . As already indicated it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." See *United States* v. *Munsingwear, Inc.,* supra, at pp. 40 & 41.

In the case of *Duke Power Company* v. *Greenwood County,* supra., which was on review with this Court as

a result of the granting of a Writ of Certiorari, this Court in a *Per Curiam* opinion, commenting upon the procedure followed by the lower courts, stated first, at p. 261:

> "This case presents irregularities in practice which we think should not be overlooked."

After a thorough discussion of the complicated procedural problems, this Court further commented, at p. 267:

> "We thus have a situation in which both courts below have failed to act in accordance with the standards of proper procedure. Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the Appellate Court to set aside the decree below and remand the cause with directions to dismiss." See *United States* v. *Hamburg-Americkanische Packetfahrt-Action Gessellschaft,* 239 U.S. 466, 475, 478, 60 L.ed. 387, 391, 392, 36 S.Ct. 212; *Altherton Mills* v. *Johnson,* 259 U.S. 13, 16, 66 L.ed. 814, 816, 42 S.Ct. 422; *Brownlow* v. *Schwartz,* 261 U.S. 216, 218, 67 L.ed. 620, 622, 43 S.Ct. 263; *United States* v. *Anchor Coal Co.,* 279 U.S. 812, 73 L.ed. 971, 49 S.Ct. 262.

In the case of *Brownlow* v. *Schwartz,* supra., cited in the case of *Duke Power Company* v. *Greenwood County,* supra., this Court stated:

> "The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the court of appeals requiring the issuance of of [sic] the mandamus in force, —at least apparently so,—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this Court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with direction to dismiss the bill, complaint, or petition. [cites omitted]. . .
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> . . .
>
> Following these precedents, the judgment below should be reversed, with directions to the Court of Appeals to remand the cause to the Supreme Court, with instructions to dismiss the Petition without costs, because the controversy involved has become moot, and therefore is no longer a subject appropriate for judicial action." *Brownlow* v. *Schwartz,* supra., at pp. 218 & 219.

This Court used very similar language in the case of *United States* v. *Anchor Coal Company,* supra., which was also cited by this Court in the case of *Duke Power Company* v. *Greenwood County,* supra.

In addition to these opinions, this Court has on many other occasions, followed the same standard disposition in federal civil cases. See *New Orleans Flour Inspectors* v. *Glover,* 161 U.S. 101, 103, 40 L.Ed. 632, 633, 16 S.Ct. 508, modg 160 U.S. 170, 40 L.Ed. 382, 16 S.Ct. 321; *Berry* v. *Davis,* 242 U.S. 468, 61 L.Ed. 441, 37 S.Ct. 208; *United States* v. *American Asiatic SS. Co.,* 242 U.S. 537, 61 L.Ed. 479, 37 S.Ct. 233; *Board of Public Utility Comrs.* v. *Compania General de Tabacos de Filipinas,* 249 U.S. 425, 63 L.Ed. 687, 39 S.Ct. 332; *Commercial Cable Co.* v. *Burleson,* 250 U.S. 360, 63 L.Ed. 1030, 39 S.Ct. 512; *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 64 L.Ed. 808, 40 S.Ct. 448; *Heitmuller* v. *Stokes,* 256 U.S. 359, 65 L.Ed. 990, 41 S.Ct. 522; *Alejandrino* v. *Quezon,* 271 U.S. 528, 70 L.Ed. 1071, 46 S.Ct. 600; *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Com.,*

274 U.S. 106, 71 L.Ed. 949, 47 S.Ct. 499; *Sprunt & Son* v. *United States,* 281 U.S. 249, 74 L.Ed. 832, 50 S.Ct. 315; *Hargis* v. *Bradford,* 283 U.S. 781, 75 L.Ed. 1411, 51 S.Ct. 342; *Mahan* v. *Hume,* 287 U.S. 575, 77 L.Ed. 505, 53 S.Ct. 223; *Railroad Com. of Texas* v. *MacMillan,* 287 U.S. 576, 77 L.Ed. 505, 53 S.Ct. 223; *Coyne* v. *Prouty,* 289 U.S. 704, 77 L.Ed. 1461, 53 S.Ct. 658; *First Union Trust & Sav. Bank* v. *Consumers Co.,* 290 U.S. 585 78 L.Ed. 517, 54 S.Ct. 61; *Daneiger Oil & Refining Co.* v. *Smith,* 290 U.S. 599, 78 L.Ed. 526, 54 S.Ct. 209; *O'Ryan* v. *Mills Novelty Co.,* 292 U.S. 609, 78 L.Ed. 1469, 54 S.Ct. 779; *Hamond Clock Co.* v. *Schiff,* 293 U.S. 529, 79 L.Ed. 639, 55 S.Ct. 146; *Bracken* v. *Securities & Exchange Com.* 299 U.S. 504, 81 L.Ed. 374, 57 S.Ct. 18; *Leader* v. *Apex Hosiery Co.,* 302 U.S. 656, 82 L.Ed. 508, 58 S.Ct. 362; *Woodring* v. *Clarksburg-Columbus Short Route Bridge Co.,* 302 U.S. 658, 82 L.Ed. 509, 58 S.Ct. 365; *Retail Food Clerks & Managers Union* v. *Union Premier Food Stores,* 308 U.S. 526, 84 L.Ed. 445, 60 S.Ct. 376; *Securities & Exchange Com.* v. *Long Island Lighting Co.,* 325 U.S. 833, 89 L.Ed. 1961, 65 S.Ct. 1085; *Montgomery Ward & Co.* v. *United States,* 326 U.S. 690, 90 L.Ed. 406, 66 S.Ct. 140; *Brotherhood of Locomotives & E.* v. *Toleda, P. & W. R. Co.,* 332 U.S. 748, 92 L.Ed. 335, 68 S.Ct. 53; *Securities & Exchange Com.* v. *Engineering Public Service Co.,* 332 U.S. 788, 92 L.Ed. 370, 68 S.Ct. 96; *Hodge* v. *Tulsa County Elections Board,* 335 U.S. 889, 93 L.Ed. 427, 69 S.Ct. 250; *Securities and Exchange Com.* v. *Philadelphia Co.,* 337 U.S. 901, 93 L.Ed. 1715, 69 S.Ct. 1715; *City of Los Angeles* v. *Tighe E. Woods,* 340 U.S. 908, 95 L.Ed. 657, 71 S.Ct. 294; *Riece Cozart* v. *Charles E. Wilson,* 352 U.S. 884, 1 L.Ed. 2d 82, 77

S.Ct. 126; *Black* v. *Amen,* 355 U.S. 600, 2 L.Ed. 2d 523, 78 S.Ct. 530; *Mechling Barge Lines* v. *United States,* 368 U.S. 324, 7 L.Ed. 2d 317, 82 S.Ct. 337; *Connecticut State Board of Parole* v. *Bey,* 404 U.S. 879, 30 L.Ed. 2d 159, 92 S.Ct. 196; *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412, 30 L.Ed. 2d 567, 92 S.Ct. 574; *Gallogly* v. *Larsen,* 420 U.S. 904, 42 L.Ed. 2d 831, 95 S.Ct. 819; *South Dakota* v. *McCay,* 420 U.S. 904, 42 L.Ed. 2d 832, 95 S.Ct. 819; *Van Lare* v. *Hurley,* 421 U.S. 338, 44 L.Ed. 2d 208, 95 S.Ct. 1741; *Weinstein* v. *Bradford,* 423 U.S. 147, 46 L.Ed. 2d 350, 96 S.Ct. 347; *Kremens* v. *Bartley,* U.S. , 52 L.Ed. 184, 97 S.Ct. ; *DeSimone* v. *United States,* 361 U.S. 125, 4 L.Ed. 2d 167, 80 S.Ct. 253.

Furthermore, this standard disposition has been followed by the various Circuit Courts of Appeals in numerous instances too voluminous to also mention herein.

In particular, the Court of Appeals for the Fifth Circuit has acknowledged the validity of the procedure prescribed by this Court of vacating the judgment below upon dismissing an appeal for mootness on many occasions.

For example, in the case of *Lebus* v. *Seafarers' International Union, etc.,* 398 F.2d 283 (C.A. 5, 1968), the Court of Appeals for the Fifth Circuit stated:

> "This is the time honored, invariable practice in the Federal system. Where an appeal is dismissed by reason of mootness, the appellate court is to vacate the decision below and direct that it be dismissed for mootness, so that it will spawn no legal consequences." See *Lebus* v. *Seafarers' International Union, etc.,* supra., at p. 283.

In a later case, in which neither party apparently requested the Court of Appeals to do so, the Court of Appeals stated simply:

> "The case as posed is moot. The judgment of the District Court is therefore vacated and the case remanded to dismiss as moot so the case will not spawn any precedential consequences." *United States* v. *Musingwear, Inc.,* 1950, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36; *St. Pieree* v. *United States,* 1943, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199; *Troy State University* v. *Dickey,* 5 Cir., 1968, 402 F.2d 515, 516-517; *New Left Educ. Project* v. *Board of Regents,* 5 Cir., 1973, 472 F2d 218, 221; *Lebus, Regional Director* v. *Seafarers' Int'l. Union,* 5 Cir. 1968, 398 F.2d 281, 283; *United States* v. *West Gulf Maritime Ass'n.,* 5 Cir., 1972, 460 F.2d 1231. And see especially our very recent decision *United States Servicemen's Fund* v. *Killen Independent School District,* 5 Cir., 1974, 693 F.2d 489." See *National Lawyers Guild, University of Texas Chapter, et al.* v. *Board of Regents,* 490 F.2d 97 (C.A. 5 1974), at p. 98.

The rationale behind these decisions of the Court of Appeals is perhaps best explained in the case of *New Left Educ. Project, et al.* v. *Board of Regents of the University of Texas System,* 472 F.2d 218 (C.A. 5, 1973). In that case, Judge Bell wrote for the Court of Appeals and said at pp. 220 & 221:

> "When a case becomes moot on appeal, the appellate court will normally dismiss the appeal, vacate the judgment of the District Court, and remand the case to the District Court with instructions to dismiss the Complaint. [cites omitted] . . . This procedure is dictated by constitutional considerations. The appeal is dismissed because the appellate court has no power to decide moot questions. The judgment is vacated and remanded with instruction to dismiss because of the need to protect the parties from the prejudice that may flow from an unreviewed standing judgment which has become unreviewable because of circumstances beyond their control. This procedure also removes any precedential effect which the judgment might otherwise have."

Although making this analysis, Judge Bell went on in the *New Left* case to decide that under the particular facts and circumstances of that case, although the appeal should be dismissed as moot, the judgment of the court below should be left standing. The factual basis supporting his decision was that the mootness of the appeal had resulted solely from the unilateral action of the Appellant in repealing the rules which the Appellees had contended to be unconstitutional, thereby precluding the Appellees from continuing to pursue their claim of unconstitutionality against the Appellant. In the Court of Appeals, the Appellees vigorously protested the dismissal of the appeal for mootnes and/or the vacation of the Order of the District Court below. Although Judge Bell felt constrained to dismiss the appeal for mootness because of the unilateral action of the Appellant in eliminating the restrictions against which the Appellees complained, thereby eliminating the controversy, Judge Bell, nevertheless, felt that in such circumstances the Appellees were entitled to have stand the judgment of the District Court below vindicating their constitutional claims.

In this case, the facts are totally different. It was the Appellee, not the Appellant, who moved the Court of Appeals to dismiss the appeal for mootness. It was the Appellant/Petitioner who advised the Court of

Appeals that it would not object to a dismissal for mootness if, and only if, simultaneously with such dismissal the Court of Appeals vacated the decision of the District Court below. In making such statement to the Court of Appeals, Appellant/Petitioner advised the Court of Appeals that it would only be appropriate for the Court of Appeals to dismiss the appeal for mootness if it also vacated the District Court Order below. Otherwise, Appellant/Petitioner would be faced with the situation (as has now occurred) of being unable to obtain review of an Order adverse to it, and would be faced with potential adverse legal consequences (as is now occurring) as a result of the continued existence of such Order. It should also be emphasized that the case before the lower courts in this matter was one of first impression.

Clearly, the situation faced by Petitioner differs substantially from that of the *New Left* case.

The Court of Appeals should either have allowed the appeal to continue, thereby giving Petitioner the opportunity to test the validity of the Order of the District Court below, or, having dismissed Petitioner's appeal for mootness, the Court of Appeals should have vacated the Order of the District Court below so as to eliminate the potential for such Order to spawn adverse legal consequences to Petitioner and others.

CONCLUSION

The question presented by this Petition for Writ of Certiorari concerns an area of grave legal consequence not only for Petitioner, but for all Appellants in the Federal Court System seeking review of an adverse decision of a Federal Court. The decision of the District Court which was appealed from by Petitioner was

clearly adverse to the interests of Petitioner, and as a result of its alleged present vitality, it has a continuing potential to spawn adverse legal consequences to Petitioner. In addition to the direct consequences to Petitioner, the ruling of the Court of Appeals could have dire precedential consequences if allowed to stand.

By its ruling, the Court of Appeals has effectively precluded Petitioner from having its appeal of the Order of the District Court heard.

The handling of the present matter is a clear, substantial and prejudicial departure from accepted appellate procedure and it should be reviewed by this Court.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue from this Court.

Respectfully submitted,

ROBERT E. HICKS
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Atlanta, Georgia 30303

Attorney for Consolidated Motor Inns

Of Counsel:

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Atlanta, Georgia 30303

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:
Consolidated Motor Inns, Debtor

In Proceedings for an Arrangement Under Chapter XII

Case No: B75-296A

(Filed October 15, 1975)

Confirmation of Arrangement

An application having been filed herein for the confirmation of Alternative A in the Arrangement proposed by the above named Debtor on the 15the Day of August, 1975, to its creditors under Chapter XII of the Bankruptcy Act, and the same having come on to be heard and duly considered on the 9th Day of October, 1975, upon due notice by mail to all creditors entitled thereto as required by law and pursuant to the order of this Court, and the Court being satisfied and finding based upon proceedings had before it on said date and on evidence received in other hearings in this matter that the Arrangement should be confirmed and that same is consistent with Chapter XII of the Bankruptcy Act,

And it appearing that said Alternative A proposal in the Debtor's Arrangement has been duly accepted in accordance with the provisions of Chapter XII of the Bankruptcy Act, and that the deposit required by the provisions of said Chapter and by said Arrangement, amounting to Two Hundred Thousand Dollars ($200,000.00) having been made in an amount not less than Five Hundred Thousand Dollars ($500,000.00), subject to the order of the Court, in the First National Bank of Atlanta, a desig-

nated depository of this Court, in the Debtor's Chapter XII account and the Debtor having been authorized by the Court to serve as disbursing agent to distribute the funds required to be distributed under the Arrangement,

And, it appearing that the provisions of Chapter XII have been complied with; and that said proposal is for the best interest of creditors and is feasible and that the said Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the said proposal and its acceptance are in good faith, and have not been made or procured by any means, promises or acts forbidden by the Bankruptcy Act; and that all payments made or promised by the Debtor, by any person issuing securities or acquiring property under the Arrangement, or by any other person, for services and for costs and expenses in, or in connection with, this proceeding, or in connection with and incident to the Arrangement, have been fully disclosed to the Court and are reasonable, or, if to be fixed after confirmation of the Arrangement, will be subject to the approval of the Court; and it also appearing that no reclamation proceedings have been filed which should prevent confirmation of the Arrangement; it is

ORDERED, that Alternative A of the said Arrangement, hereto annexed and made a part hereof, be and the same hereby is in all respects confirmed, and it is further

ORDERED, that the Debtor is hereby declared free and discharged from all its debts and liabilities provided for by the said Arrangement except as otherwise provided for in the said Arrangement or in this Order, excluding such debts as are not dischargeable under Section 17 of the Bankruptcy Act, and the debts of the Debtor's affiliated business entities (Consolidated Motor Inns, a general partnership, Suwanee Properties, a general partnership, Consolidated Motors Inns, Inc. and Suwanee Management, Inc.) having been assumed by the Debtor prior to the

filing of the petition in this proreeding and the assets of said entities being included as assets in this proceeding because they came into the possession and operation of the Debtor prior to the filing of the petition in this proceeding, are also discharged subject only to the provisions of this paragraph, and it is further

ORDERED, that the Debtor shall comply with the provisions of the Arrangement and with this Order and the other orders of this Court relative thereto, and shall take all action necessary to carry out the Arrangement, and is is further

ORDERED, that the title to the Debtor's property, real and personal, which is to be transferred pursuant to the provisions of the Arrangement shall be transferred in accordance with said provisions, and said property so transferred shall be free and clear of all debts affected by the Arrangement, except such debts as may otherwise be provided for in the Arrangement or in this Order, or in any other order directing or authorizing the transfer of such properties, and it is further

ORDERED, that the motel properties owned and operated by the Debtor and located at Suwanee, Georgia, Nashville and Lebanon, Tennessee, Zephyrhills and Port Richey, Florida, and Montgomery and Tuscaloosa, Alabama, shall be transferred to the Imperial Motels Corp. in accordance with that certain contract of sale attached to the Debtor's Arrangement as Exhibit "A". Upon the payment by said Imperial Motels, Corp. of the sales price set forth in said contract of sale ($300,000.00) and, upon said transfer, said Imperial Motels Corp. shall hold said motel properties free and clear of all liens and encumbrances except for the first or second mortgages thereon and chattel financing agreements thereon as respectively set forth on Exhibit "H" to said contract of sale, a copy of which is attached hereto, and Exhibit "I" to said contract of sale, a copy of which is attached hereto, or on such other terms and conditions as may be set forth in any additional

or separate understanding or agreement between said Imperial Motels Corp. and the mortgagee or chattel creditors of the Debtor, or any of them, or on the basis set forth hereinafter, and it is further

ORDERED, that the terms and conditions of the transfer of the Debtor's motel property at Montgomery, Alabama, in regard to the existing first mortgage against said property held by First Pennsylvania Mortgage Trust shall be as set forth in Paragraph 4(a)(1) of that certain contract of sale which is Exhibit "A" to said Arrangement, namely, the repayment terms for the loan now held by First Pennsylvania Mortgage Trust and secured by a first mortgage on said Montgomery motel property shall be such that the principal and interest of said loan shall be payable in monthly payments of Ten Percent (10%) per annum based on Twenty-Five (25) year terms, except that on the seventh anniversary of said loan as provided in this confirmation the remaining unpaid principal and accrued interest shall be due and payable in a "balloon" payment but, provided further, Imperial Motels Corp. shall have the option to further extend the terms of said loan beyond said seven year term for an additional five years during which the unpaid principal shall be amortized in quarterly payments of principal and interest at Ten Percent (10%) per annum and said Imperial Motels Corp. shall assume and be liable for payments on said loan as herein provided, or, said Imperial Motels Corp. shall assume and be liable to pay said loan on any other and different terms to which said Imperial Motels Corp. and First Pennsylvania Mortgage Trust may agree, and it is further

ORDERED, that the Debtor, Imperial Motels Corp. and the creditors of the Debtor and all other necessary parties execute and deliver, or join in the execution and delivery of whatever instruments may be necessary to effect the foregoing transfer of the Debtor's motel properties and

to effect the transfer of any other of the Debtor's properties which the Arrangement provides will be transferred, and it is further

ORDERED, that all liens, except those mortgages, deeds to secure debt and chattel liens described on Exhibits "H" and "I" to that certain contract of sale attached to the Arrangement as Exhibit "A", copies of which are attached hereto, against the Debtor's motel properties be and the same hereby are satisfied, cancelled and terminated upon tender of payment to said creditors as provided in the Arrangement, and said creditors be, and they hereby are, directed to execute any and all documents necessary to reflect the satisfaction, cancellation and termination of said liens, and it is further

ORDERED, that distribution be made in accordance with said Arrangement to the creditors having scheduled or allowed claims and that the discharge of the Debtor as to the debt of any creditor is made subject to said distribution to said creditor in accordance with the provisions of said Arrangement, and the Debtor shall act as disbursing agent for said distributions and the balance of any deposit required by this Court, if any, after all of said distributions have been made shall be withdrawn by check payable to the Debtor, and it is further

ORDERED, that all unpaid administrative expenses approved by this Court be paid within ten days after this Order or in the event of fees or compensation which are not fixed within said time, then within five days from the date of such determination, and it is further

ORDERED, that the Arrangement and its provisions shall be binding upon the Debtor and all creditors of the Debtor, whether or not they are affected by the Arrangement, or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable, but the confirmation of the

Arrangement and the discharge from this proceeding shall not be deemed a satisfaction, termination, or novation as to the security interests held by any creditor in any of the motel properties of the Debtor as set forth on Exhibits "H" and "I" to the contract of sale which is Exhibit "A" to the Arrangement, copies of which are attached hereto and it is further

ORDERED, that a copy of this confirmation may be filed in the proper office of any county in which real property of the Debtor being transferred under the Arrangement is located as evidence of the satisfaction of any and all liens and encumbrances against said property not specifically preserved by the Arrangement and this confirmation order, and it is further

ORDERED, that the objection of First Pennsylvania Mortgage Trust to the division of creditors into classes as set forth in the Arrangement be, and the same hereby is, denied and the Court finds that in the context of this Chapter XII proceeding it is a reasonable division of creditors to place all creditors holding mortgages against the motel properties of the Debtor in one class regardless of the particular motel property which constitutes security for any one of said creditors and whether said creditors hold construction of permanent loans from the Debtor and this finding is made, in part, because of the presence of a number of construction lenders in the mortgagee class and because of the prolonged negotiations between the Debtor, Imperial Motels Corp. and said creditors to reach, in the case of each creditor, a reasonable basis upon which obligations are being assumed by or the property is being taken subject to said obligations by Imperial Motels Corp. and it is further

ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or proceeding to

execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further

ORDERED, that the discharge provided the Debtor by the confirmation of the Arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and the confirmation of the Arrangement shall act as a full discharge of said debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatsoever kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or effect as to the liability of any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor, and it is further

ORDERED, that parties in interest may file objections to the allowance of any claim heretofore scheduled or filed but not allowed or disallowed, within thirty (30) days from the date hereof, and such objections and all objections heretofore filed herein shall be brought on for hearing within sixty (60) days from the date hereof, unless previously noticed for hearing; and notice of such hearing shall be given to the claimant at least five (5) days prior to the date fixed therefor; upon failure to so file objections or to notice objections for hearing as herein provided, the objection to the claim affected thereby shall be deemed waived and it is further

ORDERED, that sixty (60) days from the date said check is mailed to the creditor entitled to same, or within such further time as the Court may allow, the Debtor shall stop payment of any such checks then unpaid, and shall deposit by certified check the amount of such unpaid checks with the Clerk of this Court together with a list of the persons entitled thereto and the respective amounts due such persons, and it is further

ORDERED, that within seventy (70) days after the date the last check has been mailed to a creditor in this proceeding entitled to receive same under the Arrangement or within such further time as the Court may allow, the Debtor shall file with this Court a verified report showing compliance herewith, together with all cancelled vouchers and supporting bank statements showing disbursement of all funds deposited pursuant to the provisions of said Chapter XII and the Arrangement herein, and it is further

ORDERED, that this Court shall retain jurisdiction until the provisions of the Arrangement have been performed.

So ORDERED at Atlanta, Georgia this 15 day of October, 1975.

/s/ W. H. DRAKE, JR.
W. HOMER DRAKE, Bankruptcy Judge

CAPTION OMITTED IN PRINTING)

(FILED FEBRUARY 20, 1976)

Order

The instant case is submitted to this Court on appeal from an order of the Bankruptcy Court entered on October 15, 1975, confirming the Debtor's Plan of Arrangement and from the notice of confirmation of the Plan and Discharge entered on October 21, 1975.

On January 23, 1975, Consolidated Motor Inns (the Debtor-Appellee), a Georgia limited partnership, filed its Chapter XII petition, 11 U.S.C. § 801 *et seq.*, in this proceeding and, on that date, was continued in the possession and operation of its properties as a Debtor-in-Possession. The Debtor-Appellee filed its Plan of Arrangement on August 15, 1975, and the hearing on confirmation was held on October 9, 1975. At the hearing the Bankruptcy Court found that the requisite majorities required for confirmation of the Plan in each class of creditors had been obtained and, after finding that the Plan was in the best interest of creditors, the Plan of Arrangement was confirmed.

On March 3, 1975, the Appellant, Brand Development Corp., who had served as the general contractor for the construction of all but one of the Debtor-Appellee's motel properties, filed a claim in this proceeding. The Appellant contended that it was a secured creditor as a result of certain materialmen's liens arising out of work performed on the motels owned by the Debtor-Appellee. The Debtor-Appellee filed an objection to this claim, and on October 8, 1975, the Bankruptcy Court disallowed Appellant's claim in its entirety for voting purposes but without prejudice to Appellant's right to share in distribution under any Plan of Arrangement confirmed, if, upon a hearing on the merits, Appellant could establish that it had a valid claim in excess of any valid counterclaim of the Debtor-Appellee.

The Plan of Arrangement as confirmed concludes with the following language:

> "Confirmation of this Plan shall act as a bar to any claim it held or alleges to have held on January 23, 1975, against the partnership, the partners thereof or their spouses, arising out of the business of the partnership."

The order of confirmation dated October 15, 1975, from which this appeal is taken, provides in part as follows:

> "ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or or proceeding to execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further
>
> ORDERED, that the discharge provided the Debtor by the confirmation of the Arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and the confirmation of the Arrangement shall act as a full discharge of said debts in regard to any liabilities of said partners or spouses arising out of the operation or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatsoever kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or effect as to the liability of any

> individual general partner of the Debtor or his spouse to any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor, ...

In accordance with the provisions of the Plan of Arrangement, the sale of the Debtor-Appellee's motel properties was closed on November 25, 1975. In connection with the sale the individual partners and their respective spouses joined in the documents of conveyance as required by the order of confirmation.

The instant appeal is the only appeal from the order of confirmation being prosecuted by any creditor. The Appellant's statement of record and issues on appeal outlined four (4) issues. The Court apprehends that the controlling issue in this case is the permissibility or authority of the Bankruptcy Court to confirm a Plan of Arrangement and include in that confirmation a discharge of the general partners and their spouses when only the limited partnership filed the Chapter XII petition and when only the assets of the limited partnership were administered in the proceeding.

Resolution of the issue in this case centers on the applicability of Section 5(j) of the Bankruptcy Act, 11 U.S.C. § 23(j), to proceeding under Chapter XII, 11 U.S.C. § 801 *et seq.* Section 5(j) of the Bankruptcy Act provides:

> "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner adjudged a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts."

Under this section it is perfectly clear that the discharge in ordinary bankruptcy of a partnership entity does not affect the individual liability of the general partners. *Lib-*

erty National Bank v. *Bear*, 276 U.S. 215, 222 (1928); *In the Matter of Jercyn Dress Shop*, 379 F. Supp. 1119 (E.D. N.Y. 1974), *affirmed* 516 F.2d 864 (2nd Cir. 1975); *Young* v. *Riddell*, 283 F.2d 909 (9th Cir. 1960); *Schram* v. *Wrubel*, 38 F. Supp. 357 (E.D. Mich. 1941); *see generally* 1 A *Collier on Bankruptcy* ¶¶ 5.01, 5.15. Thus, the partnership trustee cannot prevent the partnership creditors from obtaining *in personam* judgments against the individual partners on unpaid partnership debts. *See First National Bank of Herkimer* v. *Poland Union*, 109 F.2d 54 (2nd Cir. 1940), *cert. denied*, 309 U.S. 682 (1940). However, it is the contention of the Debtor-Appellee that this section is inapplicable to a Chapter XII proceeding.

Section 402 of Chapter XII, 11 U.S.C. § 802, provides in part:

> "The provisions of chapters 1 to 7, inclusive, of this title, shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter: . . . ."

The Debtor-Appellee contends that Section 5(j) of the Bankruptcy Act is inconsistent with the provisions and purposes of Chapter XII, and, therefore, inapplicable in this proceeding.

The Debtor-Appellee argues that the inconsistency of Section 5(j) and Chapter XII lies in the inherent difference between the objective of straight bankruptcy, i.e., liquidation, and a Chapter XII proceeding, i.e., rehabilitation. Thus, the Debtor-Appellee argues that the general partners of a partnership would have no incentive to utilize Chapter XII if their individual liability may not be discharged unless the assets of the partners themselves are made available for distribution. Further, the Debtor-Appellee argues that to allow the partnership to be discharged and, yet, continue the liability of the general partners for

any deficiency, would hardly make sense in a statute triggered by the voluntary act of the general partners.

The Court disagrees. As to the first point, the general partners are just as likely to submit their assets to the Bankruptcy Court in a Chapter XII proceeding as in any other rehabilitative proceeding. The reason that they would do so is simply because their liabilities exceed their assets and they would very much like to be free of their debts and start anew. And as the Debtor-Appellee points out, the purpose of a Chapter XII proceeding is rehabilitation and there is at least some possibility in a Chapter XII proceeding that the general partners will be allowed to continue to operate their assets under a plan of arrangement and make a success of what was a failing enterprise. Indeed, the Alternative B Plan of Arrangement in the instant case would have allowed continuation by the general partners. Thus, the incentive to utilize Chapter XII under these circumstances is the same as for any of the other rehabilitative sections of the Bankruptcy Act—the continuation of an enterprise free of overburdening debts. The alternative to such an arrangement under Chapter XII is, of course, straight bankruptcy.

Next, the Debtor-Appellee argues that it would hardly make sense for the partnership to be discharged in a Chapter XII proceeding and leave the general partners liable for the deficiency. The Court agrees that such an outcome is not very sensible. However, the answer is not to allow the general partners to be discharged but to allow them to also file petitions under Chapter XII. While Bankruptcy Rule 105 abolishes the provisions of Sections 5(a) and (b) of the Bankruptcy Act, 11 U.S.C. § 23(a) and (b), allowing a joint petition, Rule 117(b) permits joint administration under these circumstances. *See generally* 8 *Collier on Bankruptcy* ¶ 4.02[4-.] (Chapter XI). Thus, the Debtor-Appellee's proposed inconsistency is seen not to exist.

This Court is not the first court to be presented with this issue. In *Acme Tool, Inc.* v. *Flesher,* 309 F.2d 636 (10th Cir. 1962), a partnership filed a voluntary petition under Chapter XII and an arrangement was confirmed. The individual partners were not parties to the Chapter XII proceeding.

> "The complaint is that the quoted provision has the effect of discharging the industrial general partners from the partnership debts. Counsel for the Trustees expressly disavows such effect and we agree that the order in question does not eliminate the liability of the general partners for partnership debts.
>
> The Bankruptcy Act provides that the discharge of a partnership does not discharge the individual general partners from the partnership debts. This provision is not inconsistent or in conflict with Chapter 12 and applies to proceedings thereunder. Hence, the confirmation of the arrangement and the discharge of the partnership could not as a matter of law release and discharge the individual partners, none of whom were parties to the Chapter 12 proceedings."
>
> 309 F.2d at 636.

See also Ellis v. *Yumen,* 324 F. Supp. 1314, 1319 (D. Hawaii 1971) (applying Section 5 to Chapter XII without discussion). This Court is in complete agreement, and thus the discharge of the limited partnership in this case did not discharge the general partners and their spouses.

Therefore, on the basis of the foregoing, the purported discharges of the general partners and their spouses and the injunction entered pursuant thereto are void and of no effect. This case is remanded to the Bankruptcy Court for disposition consistent with this opinion.

IT IS SO ORDERED.

This 20th day of February, 1976.

/s/ JAMES C. HILL
JAMES C. HILL
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2183

In the Matter of: CONSOLIDATED MOTOR INNS, Bankrupt.
CONSOLIDATED MOTOR INNS, Appellant,

versus

BRAND DEVELOPMENT CORPORATION, Appellee.

(FILED SEPTEMBER 1, 1977)

Appeal from the United States District Court for the Northern District of Georgia

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Alias Enterprises, Inc. for substitution of party-appellee is GRANTED.

IT IS FURTHER ORDERED that appellee's motion for dismissal of appeal on grounds of mootness is GRANTED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

January 6, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 76-2183—In the Matter of: Consolidated Motor Inns, Bankrupt: Consolidated Motor Inns vs. Alias Enterprises, Inc.

(Dist. Ct. No. BK 75-296 A)

(RECEIVED JANUARY 9, 1978)

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

(X) Order enclosed has been entered.

( )

EDWARD W. WADSWORTH, Clerk
/s/ By CLARE F. SACHS
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2183

In the Matter of: CONSOLIDATED MOTOR INNS, Bankrupt.

CONSOLIDATED MOTOR INNS, Appellant,

versus

ALIAS ENTERPRISES, INC., Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(FILED JANUARY 6, 1978)

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to vacate the order of the District Court for the Northern District of Georgia entered February 20, 1976 is denied.

!!!
JPC
!!!

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:		
CONSOLIDATED MOTOR INNS,	)	
Debtor,	)	
	)	IN PROCEEDINGS
	)	FOR AN ARRANGEMENT
	)	UNDER CHAPTER XII

(RECEIVED JULY 14, 1977)

Notice of Assignment of Claim

COMES NOW BRAND DEVELOPMENT CORPORATION ("BRAND") and ALIAS ENTERPRISES INC. ("ALIAS"), and shows the Court as follows:

1. On March 3, 1975, Brand filed a proof of claim in the above-styled proceedings, said proof of claim being in the amount of $483,438 for work, materials and supplies furnished to CMI in the construction of certain motels.

2. By Agreement dated March 3, 1977, Brand transferred to Alias, a Georgia corporation, all indebtedness of the Debtor to Brand and all claims of Brand against the Debtor, of every kind and description.

3. The consideration for said transfer to Alias was $1 paid by Alias to Brand and the agreement of Peachtree Bank and Trust Company, a Georgia banking corporation, to enforce certain indebtedness of Brand to it and secured by said assets conveyed, only against said assets.

4. This statement is filed in accordance with Bankruptcy Rule 12-30(e).

CARR, WADSWORTH, ABNEY & TABB
Attorneys for Brand Development Corporation

/s/ By: PETER M. WRIGHT
Peter M. Wright, by express permission

JONES, BIRD & HOWELL
Attorneys for Alias Enterprises, Inc.

/s/ PETER M. WRIGHT
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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
BANKRUPTCY COURT

CIVIL ACTION

FILE No. B75-296A

In Proceedings for an Arrangement Under Chapter XII

IN RE: CONSOLIDATED MOTOR INNS, DEBTOR

CONSOLIDATED MOTOR INNS, Debtor in Possession, Plaintiff,

v.

BRAND DEVELOPMENT CORPORATION, Defendant.

(RECEIVED JULY 14, 1977)

Order

It having been moved that Consolidated Motor Inns, Debtor in the above-styled proceeding and Alias Enterprises, Inc., assignee of Brand Development Corporation, Creditor of the Debtor in Possession be allowed to enter into a settlement of the proof of claim originally filed by Brand Development Corporation against the Debtor in Possession and the counterclaim subsequently filed by the Debtor against Brand and

Notice having been given to interested parties of the hearing for approval of this settlement and

This matter having come on before me as scheduled, and

Argument of special counsel for Debtor, and all other interested parties having been heard on this matter, and

It appearing said settlement is in the best interest of the Debtor's estate, it is hereby

ORDERED that the Settlement Agreemnt entered between CONSOLIDATED MOTOR INNS, Debtor, and ALIAS ENTERPRISES,

INC., assignee of Brand Development Corporation, to mutually dismiss their respective claims against each other be and hereby is APPROVED, and pursuant to that Agreement is it further

ORDERED that the claim of Brand Development Corporation filed in this proceeding against CONSOLIDATED MOTOR INNS, Debtor, on March 3, 1975 is hereby denied and dismissed with prejudice and the Counterclaim filed by CONSOLIDATED MOTOR INNS against Brand Development Corporation is dismissed with prejudice, and it is further

ORDERED any and all liens filed by Brand Development Corporation against the property of Consolidated Motor Inns shall be, and hereby are DISCHARGED, EXTINGUISHED and RELEASED.

This 14th day of July, 1977.

/s/ HUGH ROBINSON, JR.
HUGH ROBINSON, JR.
Bankruptcy Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2183

CONSOLIDATED MOTOR INNS, Debtor
CONSOLIDATED MOTOR INNS, Debtor-Appellant,

versus

BRAND DEVELOPMENT CORP., Creditor-Appellee

Motion of Alias Enterprises, Inc. for Substitution of Parties And for Dismissal of Appeal on Grounds of Mootness

COMES Now Alias Enterprises, Inc., a Georgia corporation, and files this motion in accordance with Rules 43 and 27 of the Federal Rules of Appellate Procedure, and shows the court as follows:

1. Brand Development Corporation ("Brand"), appellee in the above-styled case, has assigned to Alias Enterprises, Inc. ("Alias") all of its right, title and interest in and to all claims of Brand against Consolidated Motor Inns ("Consolidated"), appellant in the above-styled case, and Alias and Brand have accordingly filed in The United States District Court for the Northern District of Georgia, Atlanta Division, a Notice of Assignment of Claim, a certified copy whereof is attached hereto as Exhibit A.

2. On July 14, 1977, the Honorable Hugh Robinson, Jr., Bankruptcy Judge, United States District Court, Northern District of Georgia, Atlanta Division, entered an order dismissing all claims of Brand and Alias against Consolidated in the bankruptcy proceedings from which this appeal is taken. A certified copy of said order is attached hereto as Exhibit B.

3. Brand and Alias have compromised and settled all claims of Brand and Alias against all partners of Consolidated.

4. In view of the foregoing, Alias respectfully requests that the court enter an order (a) substituting Alias for Brand in the above-styled appeal, and (b) dismissing said appeal for grounds of mootness.

ALIAS ENTERPRISES, INC
/s/ By PETER M. WRIGHT

Jones, Bird & Howell
Haas-Howell Building
75 Popular Street
Atlanta, Georgia 30303
(404) 522-2508

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(CAPTION OMITTED IN PRINTING)

Response of Appellant to Motion of Alias Enterprises, Inc. for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness

COMES Now Consolidated Motor Inns, Debtor-Appellant herein, and files this its response to the Motion of Alias Enterprises, Inc. for substitution of parties and for dismissal of this appeal on grounds of mootness, and respectfully shows this Court as follows:

1.

Appellant has no objection to the substitution of Alias Enterprises, Inc. as Appellee in lieu of Brand Development Corp.

2.

Appellant has no objection to the dismissal of the Appeal in this case on grounds of mootness if and only if simultaneously with said dismissal this Court directs the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976.

3.

Appellant attaches hereto its brief in support of this response.

HICKS, MALOOF & CAMPBELL

/s/ By: CHARLES E. CAMPBELL
Charles E. Campbell
Attorneys for Consolidated Motor Inns, Debtor-Appellant

Hicks, Maloof & Campbell
101 Marietta Tower
Suite 2401
Atlanta, Georgia 30303
(404) 588-1100

(Caption Omitted in Printing)

Brief of Appellant in Response to Motion of Alias Enterprises, Inc. for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness

I

Facts

Alias Enterprises, Inc. (hereinafter "Alias") has filed a Motion with this Court praying that (1) is be substituted in lieu of Appellee, Brand Development Corp., in this matter, and that (2) this Appeal be dismissed on grounds of mootness. The Motion is based upon an Order of the Bankruptcy Court below dated July 14, 1977 approving the assignment of its claim by Appellee to Alias and also approving the settlement of the claim of Alias and the counterclaim of Appellant based upon a mutual dismissal with prejudice.

As a result of the above Order, Alias contends that it is the proper Appellee in this matter and that there is no reason to consider the Appeal because the various claims between Appellant and Alias have been settled.

II.

Argument

Appellant thinks it proper that the Court approve the substitution of Alias for the original Appellee, Brand Development Corp. This is based upon the approved assignment of Appellee's claim to Alias.

Likewise, Appellant has no objection to the dismissal of this Appeal upon the condition that this Court simultaneously direct the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976 from which this Appeal was taken. That Order provides in part as follows:

> "Therefore, on the basis of the foregoing, the purported discharges of the general partners and their spouses and the injunction entered pursuant thereto are void and of no effect. This case is remanded to the Bankruptcy Court for disposition consistent with this opinion." Appendix p. 451.

Clearly, it would not be proper for this Court to simply dismiss the Appeal unless it is also to require the District Court to vacate its Order. If the Order is not to be vacated with the possibility left open that other creditors who did not appeal the confirmation of the Plan proposed by Appellant may take advantage of the Order of the District Court holding invalid a part of the Order of confirmation, Appellant would have the right to prosecute this Appeal notwithstanding the settlement with Alias. On the other hand, if this Court should be inclined to dismiss the Appeal and at the same time order the United States District Court for the Northern District of Georgia to vacate its Order of February 20, 1976, the Appeal would truly be moot and there would be no reason to continue it.

III.

Conclusion

Appellant has no objection to the substitution of Alias for the original Appellee. Appellant believes the proper course for this Court to follow is to dismiss the Appeal and direct the United States District Court for the Northern District of Georgia to vacate its Order of February 20, 1976. In the absence of direction by this Court to the District Court to vacate said Order, Appellant opposes the Motion to dismiss the Appeal for the reason that the Ap-

peal would not be moot as to other creditors who did not contest the Order confirming Appellant's Plan.

HICKS, MALOOF & CAMPBELL
/s/ By: CHARLES E. CAMPBELL
CHARLES E. CAMPBELL

Attorneys for Appellant

HICKS, MALOOF & CAMPBELL
101 Marietta Tower, Suite 2401
Atlanta, Georgia 30303
(404) 588-1100

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(CAPTION OMITTED IN PRINTING)

Motion of Consolidated Motor Inns for Vacation of the Order of the District Court Appealed from by Consolidated Motor Inns

COMES NOW, CONSOLIDATED MOTOR INNS, Debtor and files this Motion in accordance with Rule 27 of the Federal Rules of Appellate Procedure, and shows the Court as follows:

1.

On or about July 22, 1977, Alias Enterprises, Inc., filed its Motion with this Court for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness. A true copy of said Motion is attached hereto as Exhibit "A," and incorporated herein by references.

2.

On or about July 26, 1977, your Movant filed its response to said Motion of Alias Enterprises, Inc., and indicated therein that it had no objection to the Dismissal of its Appeal on Grounds of Mootness if and only if simultaneously with said Dismissal this Court directed the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976. Movant also filed its Brief with this Court explaining the basis of its position. A true copy of said response and Brief in Support thereof is hereto an Exhibit "B" and incorporated herein by reference.

3.

On or about September 1, 1977, this Court entered an Order granting the Motion of Alias for substitution of Party-Appellee, and further granted Appellee's Motion for Dismissal of Appeal on Grounds of Mootness. This Court did not, however, as part of its Order, take the action requested of it by Appellant to vacate or cause to be vacated the Order of the District Court from which Appellant had filed its appeal with this Court.

4.

Although Movant believed that the meaning and effect of its previous response to the Motion of Alias in this matter, if not the literal language thereof, constituted a Motion to this Court to formally vacate the Order of the District Court, or cause same to be vacated, the record shows that it was not so treated by this Court; therefore, Movant does hereby formally make such Motion to this Court, and on the basis of the authorities cited in its Brief in Support of this Motion, respectfully submits that the entry of an Order by this Court vacating the Order of the District Court dated February 20, 1976 would be necessary, proper, and appropriate in the circumstances of this case.

WHEREFORE, your Movant prays for an Order of this Court vacating the Order of the United States District Court for the Northern District of Georgia of February 20, 1976.

Respectfully submitted,

HICKS, MALOOF & CAMPBELL
/s/ ROBERT A. BARTLETT
ROBERT A. BARTLETT

Attorneys for Movant

(CAPTION OMITTED IN PRINTING)

Motion of Alias Enterprises, Inc. for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness

EXHIBIT "A"

COMES Now Alias Enterprises, Inc., a Georgia corporation, and files this motion in accordance with Rules 43 and 27 and the Federal Rules of Appellate Procedure, and shows the court as follows:

1. Brand Development Corporation ("Brand"), appellee in the above-styled case, has assigned to Alias Enterprises, Inc. ("Alias") all of its right, title and interest in and to all claims of Brand against Consolidated Motor Inns ("Consolidated"), appellant in the above-styled case, and Alias and Brand have accordingly filed in The United States District Court for the Northern District of Georgia, Atlanta Division, a Notice of Assignment of Claim, a certified copy whereof is attached hereto as Exhibit A.

2. On July 14, 1977, the Honorable Hugh Robinson, Jr., Bankruptcy Judge, United States District Court, Northern District of Georgia, Atlanta Division, entered an order dismissing all claims of Brand and Alias against Consolidated in the bankruptcy proceedings from which this appeal is taken. A certified copy of said order is attached hereto as Exhibit B.

3. Brand and Alias have compromised and settled all claims of Brand and Alias against all partners of Consolidated.

4. In view of the foregoing, Alias respectfully requests that the court enter an order (a) substituting Alias for Brand in the above-styled appeal, and (b) dismissing said appeal for grounds of mootness.

ALIAS ENTERPRISES, INC.
/s/ By PETER M. WRIGHT

Jones, Bird & Howell
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303
(404) 522-2508

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(CAPTION OMITTED IN PRINTING)

Response of Appellant to Motion of Alias Enterprises, Inc. for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness

EXHIBIT "B"

COMES Now Consolidated Motor Inns, Debtor-Appellant herein, and files this its response to the Motion of Alias Enterprises, Inc. for substitution of parties and for dismissal of this appeal on grounds of mootness, and respectfully shows this Court as follows:

1.

Appellant has no objection to the substitution of Alias Enterprises, Inc. as Appellee in lieu of Brand Development Corp.

2.

Appellant has no objection to the dismissal of the Appeal in this case on grounds of mootness if and only if simultaneously with said dismissal this Court directs the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976.

3.

Appellant attaches hereto its brief in support of this response.

HICKS, MALOOF & CAMPBELL

/s/ By: CHARLES E. CAMPBELL
Charles E. Campbell
Attorneys for Consolidated Motor Inns, Debtor-Appellant

Hicks, Maloof & Campbell
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Atlanta, Georgia 30303
(404) 588-1100

(Caption Omitted in Printing)

Brief of Appellant in Response to Motion of Alias Enterprises, Inc. for Substitution of Parties and for Dismissal of Appeal on Grounds of Mootness

I.

Facts

Alias Enterprises, Inc. (hereinafter "Alias") has filed a Motion with this Court praying that (1) it be substituted in lieu of Appellee, Brand Development Corp., in this matter, and that (2) this Appeal be dismissed on grounds of mootness. The Motion is based upon an Order of the Bankruptcy Court below dated July 14, 1977 approving the assignment of its claim by Appellee to Alias and also approving the settlement of the claim of Alias and the counterclaim of Appellant based upon a mutual dismissal with prejudice.

As a result of the above Order, Alias contends that it is the proper Appellee in this matter and that there is n reason to consider the Appeal because the various claims between Appellant and Alias have been settled.

II.

Argument

Appellant thinks it proper that the Court approve the substitution of Alias for the original Appellee, Brand Development Corp. This is based upon the approved assignment of Appellee's claim to Alias.

Likewise, Appellant has no objection to the dismissal of this Appeal upon the condition that this Court simultaneously direct the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976 from which this Appeal was taken. That Order provides in part as follows:

> "Therefore, on the basis of the foregoing, the purported discharges of the general partners and their

> spouses and the injunction entered pursuant thereto are void and of no effect. This case is remanded to the Bankruptcy Court for disposition consistent with this opinion." Appendix p. 451.

Clearly, it would not be proper for this Court to simply dismiss the Appeal unless it is also to require the District Court to vacate its Order. If the Order is not to be vacated with the possibility left open that other creditors who did not appeal the confirmation of the Plan proposed by Appellant may take advantage of the Order of the District Court holding invalid a part of the Order of confirmation, Appellant would have the right to prosecute this Appeal notwithstanding the settlement with Alias. On the other hand, if this Court should be inclined to dismiss the Appeal and at the same time order the United States District Court for the Northern District of Georgia to vacate its Order of February 20, 1976, the Appeal would truly be moot and there would no reason to continue it.

III.

Conclusion

Appellant has no objection to the substitution of Alias for the original Appellee. Appellant believes the proper course for this Court to follow is to dismiss the Appeal and direct the United States District Court for the Northern District of Georgia to vacate its Order of February 20, 1976. In the absence of direction by this Court to the District Court to vacate said Order, Appellant opposes the Motion to dismiss the Appeal for the reason that the Ap-

peal would not be moot as to other creditors who did not contest the Order confirming Appellant's Plan.

HICKS, MALOOF & CAMPBELL

/s/ By: CHARLES E. CAMPBELL
Charles E. Campbell
Attorneys for Appellant

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101 Marietta Tower, Suite 2401
Atlanta, Georgia 30303
(404) 588-1100

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(CAPTION OMITTED IN PRINTING)

Brief in Support of Motion to Vacate the Order of the District Court Appealed from by Consolidated Motor Inns

I. FACTS

On September 1, 1977, this Court entered its Order, in response to a Motion filed by Alias Enterprises, Inc., substituting Alias for Brand Development Corporation, the Party-Appellee in this case, and further granting the substituted Appellee's Motion for Dismissal of the Appeal filed by CONSOLIDATED MOTOR INNS from the Order of the United States District Court for the Northern District of Georgia dated February 20, 1976, on the ground of Mootness.

CONSOLIDATED MOTOR INNS, in its response to said Motion of Alias, had indicated that it did not oppose the granting of said Motion by this Court for Dismissal on the Grounds of Mootness, if, and only if, as a part of said Dismissal this Court directed the United States District Court for the Northern District of Georgia to vacate its Order dated February 20, 1976.

In support of said position, CONSOLIDATED MOTOR INNS argued in its Brief that it would not be proper for this Court to simply dismiss the appeal unless its also required the District Court to vacate its Order for the reason that if the Order were not vacated the possibility would be left open that other creditors of CONSOLIDATED MOTOR INNS who did not appeal the confirmation of the plan proposed by it might take advantage of the Order of the District Court holding invalid a part of the Order of confirmation, and CONSOLIDATED MOTOR INNS would continue to have the right to prosecute its appeal notwithstanding the settlement with Alias in order to obtain a decision on the merits by this Court of its challenge to the District Court's Order. CONSOLIDATED MOTOR INNS further argued that if, on the other hand, this Court were inclined to dismiss the appeal

and at the same time vacate the Order of the United States District Court for the Northern District of Georgia, the appeal would then truly be moot, and there would be no reason to continue it.

In its action on September 1, 1977, this Court dismissed the appeal on the ground of mootness, but took no action to vacate the Order of the District Court for the Northern District of Georgia from which CONSOLIDATED MOTOR INNS had filed its appeal to this Court.

Although CONSOLIDATED MOTOR INNS believed that its response to the Motion of Alias would be treated as a Motion to vacate the Order of the United States District Court, it appears from the record that it was not so treated, and for that reason, CONSOLIDATED MOTOR INNS files this Motion with the Court, which it submits should be granted for the reasons stated below.

II. ARGUMENT

Appellant submits that this case is controlled by the long line of cases from this Court, as well as other Courts, cited by this Court in the case of *National Lawyers Guild, University of Texas Chapter* v. *Board of Regents,* 490 Fed. 2d 97 (CA 5, 1974), in which this Court, in a *per curiam* opinion dismissing an appeal as moot said:

> "The case as posed is moot. The judgment of the District Court is therefore vacated and the case remanded to dismiss as moot so the case will not spawn any precedential consequences. [cites omited]" *National Lawyers Guild,* supra, at p. 98.

The rationale behind this decision was perhaps best stated by this Court in the prior case of *Lebus* v. *Seafarers' International Union, etc.,* 398 Fed. 2d 281 (CA 5, 1968), in which this Court, in dismissing an appeal as moot, and

ordering the decision of the District Court vacated over the objection of the Appellee, stated as follows:

> "This is the time honored, invariable practice in the federal system. Where an appeal is dismissed by reason of mootness, the Appellate Court is to vacate the decision below and direct that it be dismissed for mootness, so that it will spawn no legal consequences." See *Lebus,* supra, at p. 283.

In making that comment, this Court quoted from the United States Supreme Court case of *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 71S. Ct. 104, 95 L.ED. 36 (1950) in which it was stated:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to *reverse or vacate the judgment below and remand with a direction to dismiss.* That was said in *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178 [182], to be 'the duty of the appellate court.
>
> • • • Our supervisory power • • •
>
> is commonly utilized in precisely this situation to prevent a judgment, *unreviewable because of mootness, from spawning any legal consequences.*" 340 U.S. 36, 39-41, 71 S.Ct. 104, 106-107, 95 L.Ed. 36, 41-42 (Emphasis added); [additional cites omitted].

Clearly, the rationale of these cases, and other cases cited therein, is applicable to this case in which Movant has previously urged this Court to vacate the Order of the District Court if it chose to dismiss the appeal for mootness at the instance of the Appellee, because to let the decision of the District Court stand, without providing Movant/Appellant with the opportunity to obtain a decision from this Court on the merits of its appeal would

give rise to potential adverse consequences to Movant/Appellant which might flow from having the Order of the District Court from which Movant/Appellant had appealed asserted by other creditors as having precedential value and effect.

III. Conclusion

This Court has previously granted the Motion of the Appellee in whose favor the Order of the United States District Court for the Northern District of Georgia dated February 20, 1976 ran, to dismiss the appeal filed by Movant/Appellant for mootness. As stated by this Court on many occasions, when such a Motion is granted, especially at the instance of the party in whose benefit the Order appealed from was entered, invariable practice in the federal system requires that the Appellate Court vacate the decision below and direct that it be dismissed for mootness so that it will spawn no legal consequences. For this reason, Movant/Appellant respectfully submits that this Court should enter its Order vacating the Order of the United States District Court for the Northern District of Georgia dated February 20, 1976 which was the subject matter of the appeal dismissed by this Court for mootness.

Respectfully submitted,
Hicks, Maloof & Campbell
/s/ Robert A. Bartlett
Attorneys for Movant/Appellant

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Proceedings for an Arrangement Under Chapter XII

Case No. B75-296A

In the Matter of:
Consolidated Motor Inns, *Debtor*

Filed February 14, 1978

Order

On appeal of the above styled matter to the District Court specific provisions of the Confirmation of Arrangement which discharged the individual general partners and their spouses, were held to be void and of no effect. The District remanded the case to the Bankruptcy Court. This Order is to comply with the remand and modify the Confirmation of Arrangement consistent with the District Court's February 20, 1976 Order.

The Order of the District Court went to the issue whether the Bankruptcy Court had the authority to discharge general partners and their spouses when only the limited partnership had filed a Chapter XII petition and only the assets of the limited partnership were administered in the bankruptcy proceeding.

The District Court determined that 5(j) of the Bankruptcy Act, 11 U.S.C. 23(j) as applied by 402 of Chapter XII, 11 USC 802, was controlling as this section provides:

> "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts. A general partner adjudicated a bankrupt either in a joint or separate proceeding may, pursuant to the provisions of this title, obtain a discharge from his partnership and individual debts."

The District Court determined that the discharge in Bankruptcy of the partnership under Chapter XII of the Bankruptcy Act did not effect the individual liability of the general partners and their spouses, notwithstanding the rehabilitative aspect of a Chapter XII proceeding. Partnership creditors could not be prevented from obtaining *in personam* judgments against against the individual partners and their spouses on unpaid partnership debts.

The District Court determined for the individual partners and their spouses to take advantage of Chapter XII they must file petitions with the Bankruptcy Court and undergo the joint administration of their respective estates with the partnership estate.

The District Court determined that as none of the individual general partners and their spouse had filed petitions they were not parties to this Chapter XII proceeding, their purported discharges and the injunctions entered against their creditors were void and of no effect.

On the basis of the determinations and the remand contained in the District Court's Order of February 20, 1976 it is hereby:

ORDERED, that the Bankruptcy Court has no jurisdiction to discharge or enjoin the creditors of the non-petitioning individual general partners or their spouses, further

ORDERED, that the provisions of the Plan of Arrangement and the Confirmation of Arrangement applying to the non-petitioning individual general partners and their spouses are striken, to wit:

> "Confirmation of this Plan shall act as a bar to any creditor thereafter pursuing any claim it held or alleges to have held on January 23, 1975, against the partnership, the partners thereof or their spouses, arising out of the business of the partnership."

• • •

> "ORDERED, that all creditors affected by the terms of the Arrangement be and they hereby are forever restrained and enjoined from taking any further action or proceeding in connection with their said claims, or proceeding to execute or enforce any judgment previously obtained, except to enforce the consummation of the terms of the Arrangement as confirmed herein, and it is further
>
> ORDERED, that the discharge provided the Debtor by the confirmation [sic] of Arrangement and the conclusion of this proceeding shall extend to the individual general partners and their spouses in regard to any liability of same from debts of the Debtor discharged by this proceeding and that the confirmation of the Arrangement shal act as a full discharge of the debts in regard to any liabilities of said partners or spouses arising out of the operation, or business of the Debtor. Further, the acceptance, retention or endorsement of any check representing payment under the Arrangement by any payee who is a creditor affected by the Arrangement shall constitute a full release and discharge of the Debtor, its individual general partners and their spouses respectively from any and all claims of whatever so kind or nature against any or all of them arising out of the business of the Debtor but shall be without force or affect as to the liability of any individual general partner of the Debtor or his spouse to any such creditor where such liability arises out of an indebtedness incurred other than in the operation or business of the Debtor, ..."

ORDERED, that all unnegotiated checks representing payment under the Arrangement be voided and reissued with no restrictive endorsement, further

ORDERED, that the reissued checks representing payment under the Arrangement be in the amount made certain by the Order of Confirmation dated October 15, 1975 plus in-

terest at seven (7) percent per annum from October 15, 1975, further

ORDERED, that the Plan of Arrangement and Confirmation of Arrangement be striken of all provisions enjoining the creditors and discharging the individual partners and their spouses, further

ORDERED, that all orders of this Court pertaining to the non-petitioning individual general partners and their spouses are declared void and of no effect.

ORDERED, that the Debtor's Plan of Arrangement, as modified above, is confirmed.

DATED at Atlanta, Georgia this 14 day of January, 1978.

/s/ HUGH ROBINSON
HUGH ROBINSON
Bankruptcy Judge

(CAPTION OMITTED IN PRINTING)

Notice of Appeal to District Court from Order of Bankruptcy Judge

Comes now Consolidated Motor Inns, debtor, and appeals to the District Court the Order of the Bankruptcy Court filed on February 14, 1978 in this matter.

Although the debtor does not believe this to be an adversary proceeding or contested matter, a creditor which has expressed interest in the matters contained in the Order of the Bankruptcy Court is B.V.A. Credit Corporation, whose counsel of record has been served with a copy of this Notice of Appeal.

HICK, MALOOF & CAMPBELL

/s/ By: CHARLES E. CAMPBELL
Charles E. Campbell
Attorneys for Consolidated Motor Inns, Debtor and Appellant

HICKS, MALOOF & CAMPBELL
Suite 3401, 101 Marietta Tower
Atlanta, Georgia 30303
(404) 588-1100

MOTION FILED
MAY - 5 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BVA CREDIT CORPORATION

BVA CREDIT CORPORATION'S BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL M. DANIELL
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorney for
BVA Credit Corporation

Of Counsel:

RALPH B. MATTHEWS
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Atlanta, Georgia 30303

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ARTHUR B. SEYMOUR
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Atlanta, Georgia 30303

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

NATURE OF INTEREST

BVA Credit Corporation, (hereinafter "BVA") respectfully moves for leave to file the annexed brief, as Amicus Curiae, in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Consolidated Motor Inns (hereinafter "CMI"). Consent to file a brief *Amicus Curiae* has not been given to BVA; this Motion for Leave to File Brief Amicus Curiae is made pursuant to Rule 42.

BVA is a creditor of CMI, a Georgia limited partnership, which filed a petition under Chapter XII of the Bankruptcy Act, 11 USC § 1 et. seq., including but not limited to 11 USC §§ 801 through 926 and the Rules of Bankruptcy Procedure. BVA is also a creditor of

the individual general partners of CMI and their spouses. BVA's annexed brief is limited to the question of bankruptcy jurisdiction of the aforesaid individual partners and their spouses.

FACTS NOT ADEQUATELY PRESENTED

The issue of the bankruptcy jurisdiction arises from the fact that, although the individual partners and their spouses did not file petitions in bankruptcy, never submitted their individual estates to a bankruptcy court, and never came under the personal jurisdiction of a bankruptcy court, they nevertheless received a discharge in bankruptcy from the Bankrupt Court of the Northern District of Georgia, Atlanta Division (hereinafter "Bankruptcy Court") by a Confirmation of Arrangement (hereinafter "Arrangement") dated October 15, 1975 (Pet.App. 1a-8a) which discharged the CMI limited partnership entity.

RELEVANCY

BVA is a creditor of the individual partners of CMI and their spouses by virtue of bilateral contracts of Individual Guaranty executed by the individual partners and their spouses whereby they unconditionally guaranteed payment of an Equipment Lease contract which was executed by CMI. Said contracts of Individual Guaranty provide that (1) the contracts are to become effective and that payment of the Equipment Lease contract is to be made by the individual partners and their spouses if (2) CMI defaults in any of its obligations to BVA and if (3) a petition under any chapter of the Bankruptcy Act, as amended, is filed by CMI.

CMI, but not the individual partners or their spouses, filed a petition for an Arrangement under Chapter XII of the Bankruptcy Act on January 23, 1975. No petition in bankruptcy has been filed by the individual partners and their spouses. No payment has been made to BVA on the aforesaid contracts of Individual Guaranty.

However, the Arrangement discharging CMI purports to extend to the individual general partners and their spouses; it also provides an additional method for their discharge if payment under the Arrangement is accepted by any creditor (Pet. App. 7a).

BVA refused payment under the Arrangement. BVA did not appeal the Arrangement. BVA is not contending that the CMI partnership entity should not be discharged by the Arrangement.

BVA is suing the individual partners and their spouses for a deficiency judgment on the contracts of Individual Guaranty in the amount of $325,785.28 plus costs, interest and attorney's fees in the United States District Court for the Northern District of Georgia, Atlanta Division (hereinafter "District Court").

Therefore, bankruptcy jurisdiction over the individual partners and their spouses, not the vacation of an order, is the true concern of CMI. By appeal to this Honorable Court CMI seeks to vacate the Order of the District Court entered on February 20, 1976 (Pet. App. 9a-15a). The District Court order, which CMI seeks to vacate is the result of an appeal by another creditor of CMI, Respondent, Alias Enterprises, Inc.'s predecessor, Brand Development Corp. This order determined the Arrangement's purported discharge of the indi-

vidual partners and their spouses was void. There was no discharge of the individual partners and their spouses; they filed no petition in bankruptcy.

The determination of the District Court, that the individual partners and their spouses were not discharged, caused CMI's appeal to the United States Court of Appeals for the Fifth Circuit (hereinafter "Court of Appeals"). The Bankruptcy Act § 5j, (11 USC 23j), federal and Georgia case law apply the entity theory of partnership. *Liberty National Bank* v. *Bear,* 276 U.S. 215, 222, 226, 72 L.Ed. 536, 48 S.Ct. 252 (1928); *Mitchell* v. *Hampell,* 276 US 299, 72 L.Ed. 582, 48 S.Ct. 308 (1928); *Rowland* v. *Lovett,* 45 Ga. App. 123, 163, S.E. 511 (1932); *In Re Sugar Valley Gin Co.,* 292 F.508 (N.D. Ga. 1923); *In Re Deadwyler,* 292, F. 510 (N.D. Ga. 1923). Therefore, under law, without the protection of the bankruptcy stay, the individual partners remain liable to CMI creditors who have not accepted checks representing payment under the Arrangement. (Pet. App. 7a).

Having accepted no payment under the Arrangement BVA continues to be a creditor of the individual partners and their spouses who are continuing to attempt, by appellate process, to come within the protection of the bankruptcy stay by vacating the District Court's February 20, 1976 Order (Pet. App. 9a-15a). The individual partners and their spouses are again trying to become bankrupts who have filed no petition in bankruptcy.

CMI's petition is based on illusary procedural issue. CMI ignores the plain answer that in void judgments there is no fact, issue, holding or res judicata to set aside. The only question to determine is whether the

order is truly void. That issue, which has not been presented by CMI, is best determined by a trial court where all of the particular facts can be examined.

BVA, the only party who has an interest as a Respondent, respectfully requests that it be allowed to file its annexed brief. The Respondent, Alias Enterprises, Inc., who moved the Court of Appeals to dismiss CMI's appeal on the grounds of mootness, has settled all claims against the individual partners (Pet. App. 31a).

WHEREFORE, BVA, as an *amicus curiae,* prays that: BVA Credit Corporation's Brief in Response to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be allowed filed.

PAUL M. DANIELL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

BVA CREDIT CORPORATION'S BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NATURE OF INTEREST

BVA Credit Corporation (hereinafter "BVA") is a creditor of the Petitioner, Consolidated Motor Inns (hereinafter "CMI") a Georgia limited partnership which filed a petition under Chapter XII of the Bankruptcy Act, 11 USC § 1, et. seq. including but not limited to 11 USC §§ 801 through 926, and the Rules of Bankruptcy Procedure. BVA is also a creditor of CMI's individual general partners and their spouses.

BVA is involved in two other legal actions, in addition to the case at bar, arising out of the CMI bankruptcy.

BVA is suing the individual partners and their spouses for a deficiency judgment on contracts of Individual Guaranty. These contracts guaranteed BVA payment of an Equipment Lease BVA had with CMI. Payment by the individual partners and their spouses was to be made to BVA in the event CMI defaulted in any payment obligation to BVA, or CMI filed a petition under any chapter of the Bankruptcy Act, 11 USC § 1 et. seq. BVA's suit against the individual partners and their spouses is in the United States District Court for the Northern District of Georgia, Atlanta Division (hereinafter "District Court").

BVA is also presently an appellee in this District Court in a CMI appeal from the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (hereinafter "Bankruptcy Court") (Pet. App. 45a). This appeal is from an Order of the Bankruptcy Court, dated February 14, 1978, entered to comply with the remand contained in the Order of the District Court dated February 20, 1976 and states: "Ordered that the Bankruptcy Court has no jurisdiction to discharge or injoin the creditors of the non-petitioning individual partners and their spouses . . . ." (Pet. App. 42a).

Therefore, including the case at bar, which arises from a CMI Motion to Vacate denied by the United States Court of Appeals for the Fifth Circuit (hereinafter "Court of Appeals") three courts have before them the question of bankruptcy jurisdiction over the non-petitioning individual partners of CMI and their spouses.

QUESTION PRESENTED

When an appeal arising out of a Bankruptcy Court order is dismissed for mootness, on the motion of a creditor/appellee, is the Court of Appeals required, on the subsequent motion of the appellant/debtor, to vacate the District Court order which holds certain provisions of a Bankruptcy Court order, discharging non-petitioning debtors, are void?

ARGUMENT

Simply stated the issue is: Whether it is necessary for a higher appellate court to vacate a lower appellate court order which holds that part of a trial court's order is void?

1. The District Court was sitting as an appellate court when it entered the Order of February 20, 1976 which CMI moved the Court of Appeals to vacate. As an appellate court, the District Court determined the Confirmation of Arrangement (hereinafter "Arrangement") of CMI was void as it purported to discharge the non-petitioning general partners and their spouses. That is, since the individual general partners and their spouses had filed no petition in bankruptcy they had no standing to receive a discharge. *Gross* v. *Irving Trust Co.*, 289 US 342, 344 77 L.Ed. 1243, 53 S.Ct. 605 (1933); *Meyers* v. *International Trust Co.*, 273 US 380, 385, 71 L.Ed. 692, 49 S.Ct. 372 (1927); *May* v. *Henderson*, 268, US 111, 117, 69 L.Ed. 870, 45 S.Ct. 459 (1925); *Cumberland Glass* v. *DeWitt*, 237 US 447, 452, 52 L.Ed. 1042, 35 S.Ct. 636 (1915); *Acme Harvester Co.* v. *Beckman Lumber Co.*, 222 US 300, 306, 56 L.Ed. 208, 32 S. Ct. 99 (1911); *Seiden* v. *Southland Chenilles*, 195 F.2d 899, 903 (5th Cir. 1952); *In Re Walker Grain Co.*, 295 F. 120, 122 (5th Cir. 1923) cert. denied 264 U.S. 588, 68 L.Ed. 864 (1924); *Pugh* v. *Loisel*, 219 F. 417, 421 (5th

Cir. 1915) cert. denied 238 US 631, 59 L.Ed. 1497; *Smith* v. *Burman,* 8 Ga. App. 262, 68 S.E. 1014 (1910).

2. It should be recognized that CMI's appeal became moot through CMI's own actions. CMI's brief to the Court of Appeals made no mention of BVA although the Court of Appeals' local Rule 13(a), as provided by Rule 47 of the Federal Rules of Appellate Procedure, required CMI to furnish a complete list of all persons, associations of persons, firms, partnerships or corporations which have an interest in the outcome of the case. Had CMI complied with this local rule they would not be in the dilemma they are in today. The Court of Appeals would have realized a "substantial controversy" existed which required relief. *North Carolina* v. *Rice,* 404 US 244, 246, 30 L.Ed. 2d 413, 415-416, 92 S.Ct. 402, 404 (1971).

On the basis of CMI's motions and certificate of interest showing there were no other parties concerned the Court of Appeals determined the District Court's order should be left intact. The Court of Appeals was of the opinion, based on the record, that there were no issues in the case to be tried and that the appellant brought about mootness by entering into an agreement with the appellee.

From the conditions and circumstances of this particular case the Court of Appeals did not violate the policy of dismissing a lower court order in cases which are moot. *United States* v. *Hamberg-Amerikanische Packet-Fahrt-Actien Gesellschaft,* 239 US 466, 477-478, 60 L.Ed. 387, 36 S.Ct. 212 (1916); *South Spring Hill Gold Min. Co.* v. *Amador Medean Gold Co.,* 145 US 300, 36 L.Ed. 712, 12 S.Ct. 921 (1892). By the nature of the case and the briefs before them the Court of Appeals did recognize that the District Court affirmed in part and voided in part the Confirmation of Arrangement (hereinafter "Arrangement") of the Bankruptcy Court. Accordingly, the Court of Appeals did what was "most consonant to justice", *United States* v. *Hamberg-Amerikanische, supra* at page 478, under the circumstances and dismissed CMI's appeal without opinion. The doctrine of res judicata then went to the portion of the District Court Order of February 20, 1976 which affirmed the discharge of the CMI partnership entity (Pet. App. 9a-15a).

The record indicated nothing further in the case needed to be done. The Court of Appeals knew the Arrangement (Pet. App. 1a-8a) was void as to the individual partners and their spouses who had not filed a petition in bankruptcy. There was no res judicata issue as there was no bankruptcy jurisdiction. Void judgments create no legal obligation on the parties and are legally ineffective. *Rose* v. *Himely,* 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808); *Thompson* v. *Whitman,* 18 Wall. 457, 468 21 L.Ed. 897, 901 (1874); *Windsor* v. *McVeigh,* 93 US 274, 283 23 L.Ed. 914 (1876); *Pennoyer* v. *Neff,* 95 US 714, 728, 24 L.Ed. 565 (1878); *Old Wayne Life Association* v. *McDonough,* 204 US 8, 16, 51 L.Ed. 345, 27 S.Ct. 236 (1907); *Whitmore* v. *Karrick,* 205 US 141, 149, 51 L.Ed. 745, 27 S.Ct. 434 (1907); *McDonald* v. *Mabee,* 243 US 90, 93, 61 L.Ed. 608, 37 S.Ct. 343 (1917); *Kalb* v. *Feuerstien,* 308 US 433, 439, 84 L.Ed. 370, 60 S.Ct. 343 (1940); *Bass* v. *Hoaglan,* 172 F.2d. 205, 210 (5th Cir. 1949) cert. denied 338 US 816, 94 L.Ed. 494, 70 S.Ct. 571 (1949).

3. Interestingly, *United States* v. *Munsingwear,* 340 US 36, 39-40, 95 L.Ed. 36, 71 S.Ct. 104 (1950), which CMI relies in their argument to vacate, is excellent authority not to vacate the District Court order.

In his opinion Mr. Justice Douglas refers to the authority of *Southern Pacific Railroad Co.* v. *United States,* 168 US 1, 48-49, 42 L.Ed. 355, 18 S.Ct. (1897) to relate the doctrine of res judicata to cases which are moot and points out the prerequisite of res judicata is jurisdiction:

> "The general principal announced in numerous cases is that a right, question or fact, distinctly put in issue and directly determined by a *court of competent jurisdiction* (emphasis added) as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The District Court order which CMI seeks to vacate (1) stands for the proposition that the Bankruptcy Court was not a court of "competent jurisdiction" as the individual partners and their spouses had not filed petitions (2) specifically provides that injunction entered pursuant to the discharge of the individual partners and their spouses is void and of no effect (3) removes the precedential effect of those provisions of the Arrangement discharging the individual partners and their spouses which the Bankruptcy Court had no power to make, and (4) applies the spirit and intent of *United States* v. *Munsingwear, supra* at page 60 by clearing "a path for further re-litigation".

The District Court, sitting as an appellate court, properly exercised its authority provided at 28 USC § 2106 which states:

> "The Supreme Court or any other appellate jurisdiction may affirm, modify, vacate, set aside or revise any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The District Court order which CMI seeks to vacate appropriately remanded the case to the Bankruptcy Court. The result was the Bankruptcy Court Order of February 14, 1978 which CMI is presently appealing to the District Court (Pet. App. 45a). In light of CMI's appeal, clearly the Arrangement entered by the Bankruptcy Court, as it has been modified by the Bankruptcy Court order of February 14, 1978 (Pet. App. 41a-44a) does not stand as a barrier against creditors who have not accepted payment under the Arrangement made with checks containing a restrictive endorsement (Pet. App. 7a).

As the discharge of the individual partners and their spouses is void Federal Rules of Civil Procedure Rule 60(b)(4) provides relief for those creditors who have not accepted payment under the Arrangement as this rule provides:

> "On motion and on terms as are just, the court may relieve a party . . . from a final judgment, or proceeding for the following reasons . . . (4) the judgment is void . . . ."

Rule 60(b)(4) is applied to the Bankruptcy Act by Bankruptcy Rule 924. Therefore there is no necessity to vacate the District Court Order of February 20, 1976. The path to further re-litigation is clear.

CONCLUSION

On the basis that there was no bankruptcy jurisdiction of the parties in interest who have filed this Petition, and that the portion of the District Court Order of February 20, 1976, which discharged the partnership entity need not be vacated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

However, if vacation is to be granted, BVA respectfully requests that the October 15, 1975 Bankruptcy Court Confirmation of Arrangement also be vacated, totally or as to those provisions that discharged the non-petitioning individual partners and their spouses.

WHEREFORE, BVA prays:

1. That the Writ of Certiorari be denied, or,

2. That both the District Court Order and the Bankruptcy Court Order Confirmation of Arrangement be vacated, or,

3. That the portions of the Bankruptcy Court Confirmation of Arrangement which discharges the non-petitioning individual partners and their spouses be vacated.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BVA CREDIT CORPORATION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BVA CREDIT CORPORATION

Pursuant to Rule 42(c) of the rules of this Court, Petitioner, Consolidated Motor Inns, hereby files this statement of opposition to the motion of BVA Credit Corporation (hereinafter "BVA"), and states its reasons as follows:

A. BVA Should Not Be Allowed to Participate in This Case Since It Previously Dismissed Its Appeal From the Order of Confirmation Entered by the Bankruptcy Court in This Case.

In its motion, BVA states that it did not appeal the Arrangement (Motion page iii). This statement is not completely accurate.

On October 30, 1975, BVA filed a purported Notice of Appeal from the Order of Confirmation entered by

the Bankruptcy Court. See EXHIBIT "A" attached hereto.

Then, on November 11, 1975, BVA dismissed its Notice of Appeal by memorandum to the Clerk of the District Court. See EXHIBIT "B" attached hereto.

BVA, by its own statement, was a creditor of the Petitioner, had standing to file a Notice of Appeal from the Order of the Bankruptcy Court confirming Petitioner's Plan, did file a Notice of Appeal, and then voluntarily withdrew same.

From that point forward, BVA, knowing that the Appeal of another creditor was in progress, took no action to intervene in said Appeal or participate therein. Rather, BVA sat by hoping to achieve some benefit from an appeal prosecuted by another, without having any attendant burdens or responsibilities to prosecute same.

Without discussing the merits of the brief filed by BVA with its motion, Petitioner would comment that BVA's attempt to use Rule 13a of the Fifth Circuit Court of Appeals' Rules as an excuse for its lack of participation is without merit.

As previously pointed out to the Court, Petitioner specifically advised the Fifth Circuit Court of Appeals in its response to the motion of Alias Enterprises, the Respondent, to dismiss the appeal for mootness, that it would not be proper for the Court of Appeals to dismiss the Appeal unless it also required the District Court to vacate its Order since otherwise the possibility would be left open that other creditors (such as BVA), who did not appeal the confirmation of the Plan might take advantage of the Order of the District Court holding invalid a part of the Order of Confirmation, and for this reason, Petitioner would have the right to prosecute the Appeal notwithstanding the settlement with Alias (See Appendix to Petition for Writ of Certiorari at p. 27a).

Furthermore, as stated in Local Rule 13a of the Court Rules of the Fifth Circuit Court of Appeals, the Certificate of Parties and Interested Persons is furnished in order that the Judges of the Court of Appeals might evaluate possible disqualification or recusal. Nowhere in the rule is it suggested that such lists can or will be used to evaluate the impact of a dismissal of an appeal for mootness, and Petitioner submits that the argument of BVA suggesting that the Court of Appeals so used the certificate is without merit.

B. By Its Motion to File a Brief as Amicus Curiae, BVA Is Seeking to Inject Into This Proceeding Considerations Which Are Totally Irrelevant to the Issue of Whether the Court of Appeals Erred in Refusing to Vacate the Order of the District Court Below, and Which, in Fact, Point Out the Danger Faced by Petitioner if Such District Court Order Is Allowed to Stand and for That Reason BVA's Motion Should Be Denied.

BVA argues, essentially, that the Court of Appeals was not required to vacate the District Court's Order in this matter because the District Court "merely" determined that the Order of the Bankruptcy Court discharging the partners of Petitioner and their wives from liability for the debts of Petitioner was void and of no effect because the Bankruptcy Court lacked jurisdiction. According to BVA, the Order of the Bankruptcy Court could be attacked at any time under the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure; therefore, Petitioner has no reason to complain of the District Court's "mere" declaration

that the judgment of the Bankruptcy Court was void *ab initio.*

Petitioner did not in its appeal to the Court of Appeals and does not now concede that the Bankruptcy Court lacked jurisdiction to enter those provisions of the Order of Confirmation alleged to have been declared void by the District Court in its Order of February 20, 1976. Furthermore, Petitioner would point out, for the purposes of this motion, that as to BVA, who had the opportunity to appeal the Order of Confirmation, and did not do so, the provisions of said Order would, except for the existence of the District Court Order which Petitioner was unable to have reviewed on appeal, be valid, binding, and *res judicata* as to any action subsequently taken by BVA against the individual partners of Petitioner and their spouses.

In this regard, See *Stoll* v. *Gottlieb,* 305 U.S. 165, 83 L.Ed. 104, in which this Court ruled that the Order of a Bankruptcy Court in a proceeding for the reorganization of a corporation under § 77B of the Bankruptcy Act approving a proposed Plan of Reorganization which provided, in pertinent part, for the release of a guaranty by one of the principals in the corporation, was valid, binding, and *res judicata* of the jurisdiction of the Bankruptcy Court to enter such an Order where the party seeking to enforce the guaranty had the opportunity to litigate the question of jurisdiction and chose not to do so, regardless of whether the power of the Bankruptcy Court to deal with the subject matter of a guaranty was strictly jurisdictional or quasi jurisdictional.

This opinion was amplified by this Court in the case of *Chicot County District* v. *Bank,* 308 U.S. 371, 84

L.Ed. 329, 60 S.Ct. 317, in which this Court determined that when a party has failed to raise a question and have it finally determined, such party is not privileged to remain quiet and seek to raise such jurisdictional question in a subsequent suit, since such conduct would violate the well settled principles of *res judicata.*

In a case which is directly in point as to the rights of BVA, the Supreme Court of California in *Levy* v. *Cohen,* 361 P.2d 561 (1977), ruled that a provision in a Plan of Arrangement under Chapter XII of the Bankruptcy Act which discharged the partners of the debtor partnership individually from the liabilities of the partnership was valid, binding and *res judicata* in a subsequent suit brought by a creditor of the partnership on the individual liability of the partners where such creditor had notice of the meeting at which such plan was accepted and failed to appeal the provisions thereof.

Under the rationale of these decisions, therefore, BVA, having not appealed from the Order of Confimation of the Bankruptcy Court, would, but for the existence of the District Court Order of February 20, 1976, be precluded from bringing a suit against the individual partners and their spouses.

Although Petitioner would contend, given the opportunity and the forum in which to do so, that BVA, as a dissenting minority creditor in a class which voted by the requisite majority to accept the provisions of the Debtor's Plan, would nevertheless be bound thereby even if it had followed the proper procedure of appealing the Order of Confirmation, BVA affirmatively chose not to prosecute an appeal by its conscious act of first filing a Notice of Appeal and then dismissing same.

BVA should be bound by the principles of *res judicata,* and for that reason its motion to file a brief *amicus curiae* in this Court should not be granted.

Respectfully submitted,

/s/ ROBERT E. HICKS
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Atlanta, Georgia 30303

Attorney for Consolidated Motor Inns

Of Counsel:

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Atlanta, Georgia 30303

ROBERT A. BARTLETT
Suite 3401, 101 Marietta Tower
Atlanta, Georgia 30303

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:

CONSOLIDATED MOTOR INNS, Debtor

IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XII

CASE NO.: B75-296A

(FILED OCTOBER 30, 1975)

Notice of Appeal to District Court From an Order of a Bankruptcy Judge

BVA Credit Corporation, Equipment Leasing Division appeals to the district court from the Order of the bankruptcy judge entered in the above styled case on the 21st day of October, 1975 entitled: "NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE."

The original party to the Order appealed from is:

Consolidated Motor Inns

The name and address of the original party's counsel is:

Heyman & Sizemore
Suite 300
Fulton Federal Building
11 Pryor Street
Atlanta, Georgia 30303

The parties to whom said Order operates to create a transfer of interest are:

Consolidated Motor Inns, Inc.,
Samuel H. Butrill, an individual,
Emily Butrill, an individual,

Larry C. Morris, an individual,
Kay Morris, an individual,
Duncan A. Roush, an individual,
J. W. Trunnell, Jr., an individual,
Jewell Trunnell, an individual.

The name and address of their counsel is:

Somers & Altenback
Attorneys at Law
6735 Peachtree Industrial Boulevard
Atlanta, Georgia 30340

Dated at Atlanta, Georgia this 30th day of October, 1975.

WATKINS & DANIELL
Attorneys for Appellant
BVA Credit Corporation,
Equipment Leasing Division

/s/ By: ARTHUR B. SEYMOUR
Arthur B. Seymour

1600 First Federal Building
Atlanta, Georgia 30303
(404) 522-2322

EXHIBIT "B"

LAW OFFICES OF

WATKINS & DANIELL

SUITE 1600 FIRST FEDERAL BUILDING

ATLANTA, GEORGIA 30303

November 11, 1975

ALLAN WATKINS (1908-1961)
PAUL M. DANIELL
K. EDWARD WOLCOTT

ARTHUR B. SEYMOUR

TELEPHONE
522-2322
(AC-404)

MAILING ADDRESS:
P.O. BOX 872
ATLANTA, GEORGIA 30301

(FILED NOVEMBER 12, 1975)

Memorandum

To: Ben H. Carter, Clerk
United States District Court
Northern District Of Georgia

FROM: Arthur B. Seymour
Attorney for BVA Credit Corporation

RE: Notice of Appeal to District Court
From an Order of a Bankruptcy Judge
Date Filed: October 30, 1975

In the Matter Of:

Consolidated Motor Inns, Debtor

In Proceedings for an Arrangement Under Chapter XII

Case No.: B 75-296 A

This Notice will not be acted upon by BVA Credit Corporation. Please remove it from active status.

/s/ Arthur B. Seymour
Arthur B. Seymour
Attorney for
BVA Credit Corporation
Equipment Leasing Division